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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MARIA E. BARRAZA, THOMAS
FLOURNAY, JAMES HOLT, GREGORY
LESTER, KEVIN MEEKS, EDDIE MIMS,
NANCY MOSHER, DELMAR LEE
PECK, DENISE TOMLIN, LINDA
WALKER, AND DIANE WASHINGTON,

Plaintiffs,

v.

C.R. BARD, INC., and BARD
PERIPHERAL VASCULAR, INC.,
Defendants.

MDL No. 15-2641-DGC

Case No. 2:16-CV-01374-DGC

**MEMORANDUM IN
SUPPORT OF MOTION
FOR SUBSTITUTION
AND TO AMEND**

I. Introduction

Class Plaintiffs respectfully move for an order permitting the substitution of a new proposed class representative, Karen Black, in the place of Kevin Meeks, who is unable to continue to serve as class representative. Courts routinely allow substitutions such as the one sought here, recognizing that it is inequitable and unfair to leave absent class members without a representative to press their claims based on the personal circumstances of an individual, withdrawing representative. At the same time, there is no

1 prejudice to Bard in the proposed substitution, as plaintiffs have taken numerous steps to
 2 assure that Bard has ample time and opportunity to conduct discovery of Ms. Black's
 3 claims. Further, denying Ms. Black the opportunity to directly substitute for Mr. Meeks
 4 creates needless inefficiency and delay, as she will then be forced to file a new action that
 5 most likely would ultimately be joined to this one.

6 **II. Background**

7 Kevin Meeks, a resident of California, was among the eleven class representatives
 8 who brought this class action seeking medical monitoring due to the increased medical
 9 risks of their Bard IVC filters. His deposition, which had been scheduled for November 7,
 10 2016, was postponed following his hospitalization in early November. It is unclear to
 11 counsel whether Mr. Meeks' hospitalization is related to his IVC filter. Following his
 12 hospitalization, Mr. Meeks' attorneys attempted to re-initiate contact with him to re-
 13 schedule his deposition, but were unsuccessful. On December 6, 2016, one of Meeks'
 14 attorneys informed Bard that Mr. Meeks was no longer in contact with his law firm, and
 15 would not be proceeding with this case. Plaintiffs' counsel continued to try to contact Mr.
 16 Meeks, and finally received confirmation that Mr. Meeks did not intend to pursue this
 17 case in mid-December.

18 In the meantime, plaintiffs' counsel worked to identify an appropriate substitute for
 19 Mr. Meeks, and importantly, took steps to ensure that when they notified Bard of the new
 20 plaintiff, they would have all relevant discovery information about the new plaintiff in
 21 hand, as well as signed authorizations from her, allowing Bard's record collection to begin
 22 immediately. On January 9, 2017, plaintiffs' counsel emailed Bard's counsel, informing
 23 them that a replacement for Mr. Meeks was ready to proceed. Acknowledging the limited
 24 time remaining before the cut-off date for class certification discovery (February 3, 2017),
 25 plaintiffs' counsel offered to expedite discovery of the new proposed class representative
 26 in four ways:

- 27
- 28 • First, they would provide executed authorizations allowing Bard to gather
 medical, employment, and other records;

- Second, they would provide written discovery responses within one week;¹
- Third, they would shorten the Review Grace Period, for plaintiff's privilege review of records Bard obtained, from the ten days provided under Case Management Order No. 10 (*see* ¶ 7) to two.
- Finally, the new plaintiff would sit for her deposition after the class certification discovery cut-off date, during what would then be the period for expert discovery, and well before the due date for Bard's class certification opposition.

On January 10, 2017, Bard communicated its non-consent to the proposed substitution, citing the limited amount of time remaining in class certification discovery and the gap between its learning of Mr. Meeks' decision not to pursue this case and the notification of the new plaintiff. Bard did not address the numerous steps that plaintiffs' counsel offered to take to address those concerns.

III. Argument

The Court should permit the substitution of Ms. Black for Mr. Meeks because Bard is not prejudiced by the substitution, while class members – particularly residents of California – face potential prejudice if they are left without a representative seeking to advance their claims. *See* Dkt. No. 35 (Complaint) ¶ 195(b) (proposed class of California residents). As the leading treatise on class actions states, in explaining why courts allow substitution of plaintiffs, "Rule 23 is designed to assure that the rights of absent class members are not prejudiced by the voluntary actions of the representative plaintiff." Rubenstein, 1 Newberg on Class Actions § 2:17 (5th ed. 2011).

The substitution of the new plaintiff will not prejudice Bard. First, this substitution does nothing to change any claim or defense in this case. Plaintiffs do not seek any new discovery of Bard as a result of the substitution. To the extent that Bard's records collection concerning the new plaintiff is not complete in time to take the new plaintiff's deposition by February 3, 2017, the new plaintiff will be available for a deposition after

¹ Plaintiffs' counsel will be prepared to serve those responses upon the Court's ruling on this motion.

1 that date. Taking this single deposition out of time causes no prejudice to Bard, whose
 2 class certification opposition is not due until *July 7, 2017*. See Amended CMO No. 16, at
 3 2. Even in the (highly) unlikely event that one of Bard’s experts considers the new
 4 plaintiff’s testimony in forming an opinion, those reports are not due until March 17,
 5 2017. *Id.* By contrast to Bard’s lack of prejudice, the absent class members whom Mr.
 6 Meeks is no longer able to represent will be without a representative, due to the personal
 7 circumstances of a single individual.

8 Under circumstances like this, courts routinely allow plaintiffs an opportunity to
 9 substitute an adequate class representative to allow for the fair adjudication and basic
 10 management of class actions and to fulfill its duty to protect absent class members. As the
 11 Seventh Circuit has noted, “Substitution of unnamed class members for named plaintiffs
 12 who fall out of the case because of settlement or other reasons is a common and normally
 13 an unexceptionable (‘routine’) feature of class action litigation ... in the federal courts....”
 14 *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2005).²

15 Plaintiffs’ counsel, in expeditiously vetting and presenting a new class
 16 representative, acted appropriately to protect absent class members, whose claims should
 17 not be affected by an issue that has only individual and not classwide impact. In
 18 repeatedly allowing similar substitutions, courts have even provided class counsel
 19 additional time to identify new representatives (which counsel here do not seek). See *In*
 20 *re Nat’l Austl. Bank Sec. Litig.*, No. 03-cv-6537, 2006 WL 3844463, at *3 (S.D.N.Y. Nov.
 21 8, 2006) (collecting cases that “demonstrate that courts not only may, but should, respond
 22 to the pre-certification mooted of a class representative’s claims by permitting

23
 24 ² See also, e.g., *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-
 25 KHV, 2009 WL 3122501, at * 2 (D. Kan. 2009) (granting motion for leave to amend the
 26 complaint to substitute new proposed class representatives when original plaintiffs stated
 27 that “other legal matters preclude him from fulfilling his responsibilities as the class
 28 representative” and noting that “the need to substitute new plaintiffs as class
 representatives does not frequently arise at convenient times”); *Bristow v. Lycoming*
Engines, No. 06-cv-1947, 2007 WL 2695226 (E.D. Cal. 2007) (permitting substitution of
 class representative when original representative lacked standing); *Wright v. Am. Bankers*
Life Assur. Co., 586 F. Supp. 2d 464, 475 (D.S.C. 2008) (noting that “in the class action
 context, shuffling and substitution of class representatives is not uncommon”).

substitution of a new class representative”) (internal citation and quotation omitted).³

These cases reflect courts’ recognition that denying substitutions like Ms. Black’s leads to inefficient and irrational results. If Ms. Black, whose claims were tolled by the filing of the class complaint, *see American Pipe & Construction Co. v. Utah*, 415 U.S. 952 (1974), is denied an opportunity to enter this case directly, she will be forced to file a separate and new class complaint on behalf of California residents, which would then most likely be related to and consolidated with this litigation. All that would have been gained was needless delay.

Ordinarily, leave to amend is to be “freely given” in the absence of ““undue delay,” “bad faith,” “undue prejudice to the opposing party,” or “futility of amendment.”” *Reed v. Dynamic Pet Prods.*, No. 15-cv-0987, 2016 WL 4491597, at *1 (S.D. Cal. Jan. 5, 2016) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962) and Fed. R. Civ. P. 15(a)). As explained above, none of those factors is present here, particularly given plaintiffs’ counsel’s diligence in identifying and presenting a new class representative after it became clear that Mr. Meeks was not able or willing to continue, and their offer to expedite discovery and to present Ms. Black during the expert discovery period.

A “good cause” standard governs amendments to a scheduling order. *See* Fed. R. Civ. P. 16(b)(4). The operative case management schedule (Dkt. No. 4141) is silent as to deadlines for amendment of pleadings, and this amendment will potentially necessitate only a single deposition after the current cut-off date (and well before Bard’s deadline to oppose class certification), so Rule 16’s standard does not necessarily apply. *See, e.g., Little v. Ryan*, No. 12-cv-2512, 2014 WL 687965, at *2 (D. Ariz. Feb. 21, 2014) (holding that good cause standard applies when leave to amend is sought after the deadline for

³ *Birmingham Steel Corp. v. Tennessee Valley Authority*, 353 F.3d 1331, 1343 (11th Cir. 2003) (holding that the district court should have allowed a reasonable time for substitution of an inadequate class representative); *In re Initial Pub. Offering Sec. Litig.*, 2008 WL 2050781, at *2 (S.D.N.Y. May 13, 2008) (holding that plaintiffs’ counsel should be afforded a reasonable period of time for the substitution or intervention of a new class representative).

amending pleadings has passed). Even if it does, however, there is good cause to allow Ms. Black to enter this litigation.

This Court has recognized that a class representative's individual health issues are a legitimate basis for allowing for a substitution, and constituted good cause to modify a scheduling order. *See Rice v. Lender Servs. Direct, Inc.*, No. CV-06-2727, 2007 WL 2287873, at *1-2 (D. Ariz. Aug. 8, 2007) (Campbell, J.) (holding that the plaintiff's husband's surgery constituted a "material event" justifying reconsideration of denial of motion for leave to amend the complaint).⁴ Here, plaintiffs do not seek alteration of the overall schedule, but instead are themselves consenting to and facilitating Bard taking a single deposition out of time, if necessary. In addition, as noted above, absent leave to amend, Ms. Black will be forced to file a separate action, creating needless inefficiency and delay.

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court allow Plaintiffs to amend their complaint solely to reflect the substitution of Ms. Black for Mr. Meeks. Plaintiffs agree that Bard need not file an amended answer to the amended complaint.

Dated: January 12, 2017

ON BEHALF OF PLAINTIFFS AND THE PROPOSED CLASS

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⁴ *See also Aguilar v. Boulder Brands, Inc.*, No. 3:12-CV-01862-BTM, 2014 WL 4352169, at *11 (S.D. Cal. Sept. 2, 2014) (allowing motion to substitute class representative after finding that "Plaintiff's counsel acted diligently and promptly by filing this motion less than a month after learning that [the withdrawing plaintiff] sought to withdraw as named Plaintiff due to health issues.").

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